SUPREME COURT, U.S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-1261

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs-Respondents

AND

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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INDEX

	PAGE
DECISIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
The Court Below Failed to Apply or Misapplied a Controlling Federal Statute With no Attempt to Justify its Order	5
(1) Contrary to the mandate of this Court, the District Court of Appeal of Florida failed to apply the venue provision of Section 94	5
(2) The District Court of Appeal of Florida misapplied the Section 94 venue provision	7
CONCLUSION	10
APPENDIX A—Order of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida	A1
APPENDIX B—Order of the District Court of Appeal of Florida	A2
APPENDIX C—Order of the District Court of Appeal of Florida denying rehearing	A3
APPENDIX D—Order of the Supreme Court of Florida denying petition for certiorari	A4

TABLE OF AUTHORITIES

CASES

	PAGE
Bruns, Nordeman & Co. v. *American National Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968)	6
Buffum v. *Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952)	6, 9
Callender v. *Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966)	2
Casey v. *Adams*, 102 U.S. 66 (1880)	8
Cope v. *Anderson*, 331 U.S. 461 (1947)	6
Exchange National Bank of Chicago v. *Rock*, 197 So.2d 52 (Fla. Dist. Ct. App. 1967)	7
First National Bank of Boston v. *United States District Court for the Central District of California*, 468 F.2d 180 (9th Cir. 1972)	6
General Electric Credit Corp. v. *James Talcott, Inc.*, 271 F.Supp. 699 (S.D.N.Y. 1966)	7
Helco, Inc. v. *First National City Bank*, 470 F.2d 883 (3rd Cir. 1972)	7
International Refugee Organization v. *Bank of America National Trust & Savings Association*, 86 F.Supp. 884 (S.D.N.Y. 1949)	7
Leonardi v. *Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936)	6
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555 (1963)	2, 6, 7, 9
Michigan National Bank v. *Robertson*, 372 U.S. 591 (1963)	8, 9
Radzanower v. *Touche Ross & Co.*, 44 U.S.L.W. 4762 (June 7, 1976)	6
United States National Bank v. *Hill*, 434 F.2d 1019 9th Cir. 1970)	6

STATUTES

Section 94 of the National Bank Act, 12 U.S.C. § 94 _ *passim*

IN THE

Supreme Court of the United States

October Term, 1975

No.

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

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RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner The Chase Manhattan Bank, National Association ("Chase") seeks a writ of certiorari to review an order of the District Court of Appeal, Third District, of

the State of Florida* which, without opinion, contravenes Section 94 of the National Bank Act, 12 U.S.C. § 94, and compels Chase, a national bank established and located in New York, to defend this *in personam* action in Florida.

Decisions Below

The order of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, denying Chase's motion under Section 94 of the National Bank Act to quash service and dismiss the complaint is printed as Appendix A, p. A1, *infra.*

The order of the District Court of Appeal of Florida, Third District, affirming the denial of Chase's motion to dismiss is printed as Appendix B, p. A2, *infra.* The order of the District Court of Appeal denying Chase's petition for rehearing is printed as Appendix C, p. A3, *infra.*

The order of the Supreme Court of Florida denying for lack of jurisdiction Chase's petition for certiorari is printed as Appendix D, p. A4, *infra.*

Not one of the foregoing orders was accompanied by an opinion.

Jurisdiction

The order of the Supreme Court of Florida denying Chase's petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).**

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* This petition is directed to the District Court of Appeal because, while the Florida Supreme Court denied Chase's petition for certiorari, it did so on the ground of lack of jurisdiction and therefore entered no judgment. *See* Callender v. Florida, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

** 28 U.S.C. § 1257(2) provides that a final judgment or decree of the highest court of a state may be reviewed by this Court where the validity of a federal statute is thereby drawn into question. A federal statute has clearly been drawn into question by the decision below and the only other jurisdictional issue, *i.e.*, whether that decision is "final," has been resolved by this Court in its opinion in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963), where the Court

(*continued on page 3*)

Questions Presented

1. Did the court below err in sustaining venue of the action in Florida as against a national bank established and located in New York in view of the prohibition of Section 94 of the National Bank Act, 12 U.S.C. § 94, permitting a national bank to be sued only where it is established or located, and where there was no basis for finding either an exemption from or waiver of the venue provision?

2. Do the orders of the Florida courts denying effect to an important federal statute, without any opinion or explanation, so far depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

Statute Involved

The statute involved is Section 94 of the National Bank Act, 12 U.S.C. § 94, which provides:

"§ 94. Venue of Suits.

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Statement of the Case

This action was commenced in the Circuit Court for Dade County, Florida, on November 13, 1974. The com-

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(*continued from page 2*)

ruled in favor of accepting jurisdiction over the very question at issue here—the applicability of 12 U.S.C. § 94—prior to any consideration by the court below of the merits. The federal issue, *i.e.*, the applicability of 12 U.S.C. § 94, has been finally decided at the highest state level and Chase's position, if correct, should prohibit consideration of the merits as regards Chase in the Florida forum.

plaint alleges in substance that the Trustees of the Chase Manhattan Mortgage and Realty Trust and Chase, investment advisor to the Trust, breached the terms of a commitment by the Trust to fund a housing development proposed by plaintiffs. Chase was not a party to that commitment, nor did it execute any of the loan documents in connection with that commitment.

Chase is a national banking association. Chase's charter specifies that it is located in New York, New York. Chase moved to quash service of process and to dismiss the complaint on January 6, 1975, on the ground that venue in Dade County, Florida, was improper as to Chase by reason of the venue provisions of Section 94 of the National Bank Act, 12 U.S.C. § 94.

The Circuit Court for Dade County denied Chase's motion without opinion on March 13, 1975. Chase appealed to the Florida District Court of Appeal on the ground that the decision of the Circuit Court contravened Section 94 of the National Bank Act, which provides that a national bank can be sued only in the jurisdiction in which it is established or located.

The District Court of Appeal affirmed the decision of the Circuit Court without opinion on July 29, 1975. Chase moved for rehearing on the ground that the District Court of Appeal had overlooked or failed to consider the venue provisions of Section 94. The petition was denied without opinion on September 11, 1975.

On October 14, 1975, Chase filed a petition for a writ of certiorari in the Supreme Court of Florida on the ground that the failure of the lower court to apply Section 94 was in direct conflict with prior decisions of the Florida appellate courts. Certiorari was denied on April 30, 1976.

Meanwhile, discovery in the action is proceeding. No trial date has been set.

REASONS FOR GRANTING THE WRIT

This Court should now review and reverse the decision of the District Court of Appeal of Florida because it contravenes a controlling federal statute without explanation or justification and in flagrant disregard of the prior decisions of this Court, as well as those of other federal and state courts, including the courts of the State of Florida.

The Court Below Failed to Apply or Misapplied a Controlling Federal Statute With no Attempt to Justify its Order

The decision below failed to apply or misapplied the venue provisions legislated by Congress in Section 94 of the National Bank Act. Section 94 provides, in essence, that litigation against a national bank may proceed only in a state or federal court in the district, county or city in which the bank is established or located, *i.e.*, maintains its principal place of business. This provision is mandatory, not discretionary in application and, since Chase admittedly maintains its principal place of business in New York, New York, Section 94, if correctly applied by the Florida courts, would preclude this suit against Chase in Florida.

The absence of any written opinion by any Florida courts renders it impossible to determine whether the Florida Courts misconstrued Section 94 or simply failed to consider it. However, in either event, the decision below is in direct conflict with the statute and well-recognized decisions of this Court.

(1) Contrary to the mandate of this Court, the District Court of Appeal of Florida failed to apply the venue provision of Section 94.

The failure of the court below to apply Section 94 contravenes the repeated holdings of this Court that the venue provision of the National Bank Act is mandatory. In

Mercantile National Bank at Dallas v. *Langdeau,* 371 U.S. 555, 562 (1963), this Court concluded that the specific venue provision of Section 94 takes precedence over general state venue provisions and "...must be given a mandatory reading." Congress had specified the precise federal and state courts in which suits against national banks could proceed and this Court "... would not lightly conclude that a congressional enactment has no purpose or function." *Mercantile National Bank at Dallas* v. *Langdeau, supra,* at 560. See also, *Cope* v. *Anderson,* 331 U.S. 461, 467 (1947) ("For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located (citations omitted), and in that district *alone* can it be sued." (Emphasis added.))

This Court has only recently upheld the mandatory nature of the venue provision of Section 94 as against the general venue provision of another federal statute. In *Radzanower* v. *Touche Ross & Co.*, 44 U.S.L.W. 4762, 4765 (June 7, 1976), this Court held that "...the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act. We conclude, therefore, that a national banking association is subject to suit under the Securities Exchange Act only in that district where it is established ...." It is settled law that a national bank is established at the place specified in the bank's charter. *Radzanower* v. *Touche Ross & Co., supra,* at 4762-63. Chase's charter specifies New York, New York.

The lower federal courts have been unanimous in construing Section 94 as requiring that national banks be sued only in the district in which they are established. See *Leonardi* v. *Chase National Bank,* 81 F.2d 19, 22 (2d Cir.), *cert. denied,* 298 U.S. 677 (1936); *Buffum* v. *Chase National Bank,* 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 394 F.2d 300, 304 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *United States National Bank* v. *Hill,*

434 F.2d 1019, 1020 (9th Cir. 1970); *First National Bank of Boston* v. *United States District Court for the Central District of California,* 468 F.2d 180, 182-83 (9th Cir. 1972); *Helco, Inc.* v. *First National City Bank,* 470 F.2d 883, 885 (3d Cir. 1972); *International Refugee Organization* v. *Bank of America National Trust & Savings Association,* 86 F.Supp. 884, 886 (S.D.N.Y. 1949); *General Electric Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699, 708 (S.D.N.Y. 1966).

Moreover, the Florida District Court of Appeal itself recognized, in its opinion in *Exchange National Bank of Chicago* v. *Rock,* 197 So.2d 52 (Fla. Dist. Ct. App. 1967), that the Section 94 venue provision is mandatory. In reversing the lower court's failure to apply Section 94 in that case, the Florida District Court of Appeal cited the decision of this Court in *Mercantile National Bank at Dallas* v. *Langdeau, supra,* and held that, "[t]he federal statute prescribing venue in the district or county in which the bank is located is mandatory...." 197 So.2d at 53.

There is no doubt that Section 94 bars suit against Chase in any place other than in New York. The failure of the court below to apply Section 94 contravenes the words and purpose of the statute and the decisions of this Court, other federal courts, and the courts of the State of Florida. The importance of proper and consistent application of a controlling federal statute requires that certiorari be granted and the decision below reversed.

(2) The District Court of Appeal of Florida misapplied the Section 94 venue provision.

If the court below did consider Section 94, its decision affirming venue in Florida as against Chase could only have been based upon one of the two recognized exceptions to Section 94: that the instant action was a "local" action or that Chase had waived its Section 94 venue right. Since not one of the three Florida Courts articulated the reasoning underlying its decision, it is impossible to determine which, if either, of these two theories might have been thought to

justify venue in Florida. However, it is clear that there was no basis for applying either theory.

If applied, the court below could only have misconceived the nature of the local action exception to Section 94 defined by this Court in *Casey* v. *Adams,* 102 U.S. 66 (1880). Although plaintiffs argued that any action involving real property located in the State of Florida necessarily qualifies as a "local action" for purposes of the exception to Section 94, that argument is clearly incorrect.

This Court has defined the "local action" exception to cover those cases in which a plaintiff would otherwise be effectively prevented by the venue provisions of Section 94 from obtaining the relief sought, *i.e.,* the action could *only* be brought at the situs of the property involved in the litigation. *Casey* v. *Adams, supra,* at 68; *Michigan National Bank* v. *Robertson,* 372 U.S. 591, 593 (1963).

It is clear that this action is not "local" as defined in *Casey.* Rather, this action is a routine *in personam* action for alleged breach of an agreement (to which Chase is not even a party). The fact that the subject of that agreement involved proposed construction on real property located in Dade County, Florida does not convert the action into an *in rem* proceeding, particularly as to Chase, which merely acted as investment advisor to the lender. The action could have been brought in the state or federal courts of New York where the same relief sought in Florida—damages and specific performance—is available.

Nor would the Court below be correct in concurring with plaintiffs' contention that Chase "relocated" itself in Florida for the purpose of transacting business with plaintiffs and thereby waived its Section 94 venue right. The sole basis for such a finding is the unsupported, unverified allegations of plaintiffs' complaint, which hardly constitute requisite proof of conduct of Chase amounting to "a voluntary and intentional relinquishment or abandonment"

of the privilege. *Buffum* v. *Chase National Bank, supra,* 192 F.2d at 60-61. The record is otherwise devoid of any indication that Chase entered the State of Florida with the purpose of transacting business with plaintiffs.

However, even if the allegations of the complaint were true—which they are not—it would be apparent that the only contacts Chase had with the State of Florida during the 12 month period here in question were two brief visits to plaintiffs' office by a junior appraisal officer. This is hardly sufficient to constitute a "relocation" of Chase in Florida or a waiver of Chase's Section 94 venue right.

Indeed, even if Chase had been party to the loan commitment—which it was not—and had transacted business with plaintiffs in Florida—which it did not—and even if it had done so not via two brief visits by a junior officer but through a branch bank or wholly-owned subsidiary located in Florida, it is clear that even this conduct would not constitute a waiver of the venue provisions of Section 94. See *Helco* v. *First National City Bank, supra,* 470 F.2d at 885. ("It is axiomatic that a waiver is a voluntary and intentional relinquishment or abandonment of a known right.... We do not think that the requisite intent to waive this venue right can be implied merely from the act of doing business outside the district in which the bank is established.")

If the court below implied waiver on the basis of the record before it, it clearly misapplied Section 94 and the decisions of this Court. In each of the decisions referred to in this petition—including the decisions of this Court in *Mercantile National Bank* v. *Langdeau, supra,* and *Michigan National Bank* v. *Robertson, supra*—the national bank involved was being sued in a district in which it was doing business. However, the important fact is that it was not the district in which the bank was established and, as a consequence, the proper application of Section 94 mandated

that the action be dismissed as against the bank for improper venue.

The court below had no basis on the law or the facts for finding either an exemption from or waiver of Chase's Section 94 venue right and to the extent it did so, it misapplied the controlling federal statute in a manner inconsistent with the decisions of this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision below reversed.

July 28, 1976

Respectfully submitted,

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Of Counsel

MILBANK, TWEED, HADLEY
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APPENDIX A

ORDER DENYING MOTION TO QUASH AND DISMISS

THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA

SAILBOAT APARTMENT CORP., a Florida corporation, et al.,

Plaintiffs,

vs.

CHASE MANHATTAN BANK, a New York national banking association, et al.,

Defendants.

THIS CAUSE having come on for hearing on Defendant Chase Manhattan Bank, N.A.'s Motion to Quash Service and Dismiss Complaint, the Court having heard argument of counsel, having reviewed the pleadings, documents and other memoranda in the file, and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. Chase Manhattan Bank, N.A.'s Motion to Quash and Dismiss is denied.

2. Chase Manhattan Bank, N.A. shall file an Answer within twenty (20) days from the date of this Order.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 13th day of March, 1976.

LEWIS B. WHITWORTH
Circuit Court Judge

APPENDIX B

ORDER OF THE DISTRICT COURT OF APPEAL

THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CHASE MANHATTAN BANK, a New York national banking association,

Appellant,

vs.

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, HESTER KAPELOW, individually, jointly and severally, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSELY, JAMES D. LANDAUER, FREDERIC P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Appellees.

Opinion filed July 29, 1975.

An interlocutory Appeal from the Circuit Court for Dade County, Lewis B. Whitworth, Judge.

Jones, Paine & Foster and Marjorie D. Gadarian, for Appellant.

Pettigrew & Bailey; Greenberg, Traurig, Hoffman, Lipoff & Quentel; Smathers & Thompson, for appellees.

Before BARKDULL, C. J., and HENDRY and NATHAN, JJ.

PER CURIAM.

Affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CHASE MANHATTAN BANK, a New York national banking association,

Appellant,

vs.

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, HESTER KAPELOW, individually, jointly and severally, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERIC P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Appellees.

Thursday, September 11, 1975

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

CLERK, *District Court of Appeal, Third District*

APPPENDIX D

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF FLORIDA

CHASE MANHATTAN BANK, ETC.,

Petitioner,

vs.

SAILBOAT APARTMENT CORP., ETC., et al.,

Respondents.

FRIDAY, April 30, 1976

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ROBERTS, ADKINS, BOYD AND HATCHETT, JJ., CONCUR

MIAMI REVIEW — MIAMI, FLORIDA

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term 1975

NO. 76-126

THE CHASE MANHATTAN BANK,
a New York banking association,
Defendant-Petitioner,

— against —

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly, and severally,
Plaintiffs-Respondents,

and

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUDER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,
Defendants.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT I	4
I	
THE FLORIDA INTERMEDIATE APPELLATE COURT'S AFFIRMANCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER WHICH DENIED PETITIONER'S MOTION TO DISMISS IS NOT A FINAL JUDGMENT OR DECREE PURSUANT TO TITLE 28, U.S.C. §1257.	
ARGUMENT II	9
II	
THE DECISION BELOW MAY BE UPHELD BECAUSE IT IS BASED UPON ADEQUATE STATE GROUNDS.	

TABLE OF CONTENTS (cont.)

Page

ARGUMENT III 11

III

PETITIONER HAS ASSERTED NO SUBSTANTIAL FEDERAL QUESTION.

ARGUMENT IV 12

IV

RECOGNIZED EXCEPTIONS TO THE NATIONAL BANK ACT ARE APPLICABLE TO THIS CASE AND SUPPORT THE DECISION BELOW.

A. Waiver is a Recognized Exception to the Application of 12 U.S.C. §94 and Supports the Procedural Decision Below

B. The Nature of the Action

CONCLUSION 21

CASES CITED

Case	Page
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	8
Buffum v. Chase National Bank of N.Y., 192 F.2d 58 (7th Cir. 1951)	14, 15
Cape Cave Corp. v. Adams Construction Corp. 256 So.2d 413 (2d Fla. DCA 1972)	5, 15
Casey v. Adams, 102 U.S. 66, 68, 26 L.Ed. 52 (1880)	12, 17, 18, 19
Central Bank v. Superior Court of Sacramento, 106 Cal.App. 962 (Ct.App. 1973)	14
Charlotte National Bank v. Morgan, 132 U.S. 141, 145 (1889)	13
Chateau Lafayette Apts., Inc. v. Meadowbrook National Bank, 416 F.2d 301, 304, 305 (5th Cir. 1969)	18, 19, 20
Chicago B. & Q. R. Co. v. People of Illinois ex rel. Commissioners, 200 U.S. 561 (1906)	11
Cincinnati St. R. Co. v. Snell, 179 U.S. 395 (1900)	6
Clark v. Kansas City, 172 U.S. 334 (1898)	6

CASES CITED (cont.)

Case	Page
Cohen v. Century Ventures, 163 So.2d 799 (2d Fla. DCA 1964)	18
County of Okeechobee v. Florida National Bank, 150 So. 124, 126 (Fla. 1933)	14
Cravero Home Building Co. v. Jaffe, 142 So.2d 342 (3d Fla. DCA 1962)	5, 15
Davidson v. Lely Estates, Inc., 330 So.2d 528 (2d Fla. DCA 1976)	19
Dolgow v. Anderson, 45 FRD 470 (E.D.N.Y. 1968)	14
Durley v. Mayo, 341 U.S. 277, 281 (1955)	10
Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902)	11
Ellis v. Dixon, 349 U.S. 458, 459 (1954)	10
Georgia Casualty Co. v. O'Donnell, 147 So. 267 (Fla. 1933)	18
Honeyman v. Hanan, 300 U.S. 14, 18 (1936)	9

CASES CITED (cont.)

Case	Page
Lapinsohn v. Lewis Charles, Inc., 240 A.2d 90 (Pa. 1968)	14
Lichtenfels v. North Carolina, 132 SE2d 360, 363	14
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934)	9
McComb v. Commissioners, 91 U.S. 1 (1876)	6
Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551 (1944)	4
Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608, 610-611 (1892)	6
Mercantile National Bank v. Langdeau, 371 U.S. 555, 557-558 (1963)	6, 7
Michigan National Bank v. Robertson, 372 U.S. 591, 594 (1963)	13, 19
Missouri & Kansas R. Co. v. Olathe, 222 U.S. 185 (1911)	6
National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., et al, ___ U.S. ___, 96 S.Ct. 1632, 48 L.Ed.2d 92 (1976)	13

CASES CITED (cont.)

Case	Page
Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390 (1951)	11
Phyle v. Duffy, 334 U.S. 431 (1946)	9
Radio Station WOW v. Johnson, 326 U.S. 120, 123-124 (1944)	8
Radzanower v. Touche Ross and Co., et al, __ U.S. __, 96 S.Ct. 89 (June 7, 1976)	12, 13, 14
Republic National Gas Co. v. Oklahoma, 334 U.S. 62, 67-69 (1947)	8
Rutherford v. Fisher, 4 Dall. (4 U.S.) 22 (1800)	6
Sales v. Berzin, 212 So.2d 23 (4th Fla. DCA 1968)	18
Stembridge v. Georgia, 343 U.S. 541, 547 (1951)	10
Super Service Products Corp. v. North Store Corp., 214 So.2d 664 (3d Fla. DCA 1968)	19
Ungar v. Sarafite, 376 U.S. 575, 582 (1964)	9

CASES CITED (cont.)

Case	Page
West Chicago St. R. Co. v. Illinois ex rel. Chicago, 201 U.S. 506, 579 (1905)	11
Whitney v. California, 274 U.S. 357, 360-361 (1926)	9
Willner v. Committee on Character, 373 U.S. 96, 102 (1963)	9
Wood v. Chesborough, 228 U.S. 672, 676-680 (1912)	11
Woods v. Nierstheimer, 328 U.S. 211 (1945)	9
Zucht v. King, 260 U.S. 174 (1922)	11

STATUTES CITED

	Page
Title 12, U.S.C. §94, The National Bank Act	12, 13, 19
Title 28, U.S.C. §1257	2, 4, 6, 8

RULES CITED

Florida Rules of Civil Procedure 1.030	6
Florida Rules of Civil Procedure 1.110(b)	19

OTHER AUTHORITIES CITED

1 ALR3d 904 (1964)	13
Am. Jur., *Venue* (1st Ed.) §46	13
34 Geo. Wash. L. Rev. 777, 778	16

in the

Supreme Court

of the

United States

October Term 1975

NO. 76-126

THE CHASE MANHATTAN BANK,
a New York banking association,

Defendant-Petitioner,

— *against* —

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly, and severally,

Plaintiffs-Respondents,

and

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUDER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA INTERMEDIATE APPELLATE COURT'S AFFIRMANCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER WHICH DENIED PETITIONER'S MOTION TO DISMISS IS A FINAL JUDGMENT OR DECREE PURSUANT TO TITLE 28, U.S.C. §1257?

II.

WHETHER THE DECISION BELOW MAY BE UPHELD BECAUSE IT IS BASED UPON ADEQUATE STATE GROUNDS?

III.

WHETHER PETITIONER HAS ASSERTED A SUBSTANTIAL FEDERAL QUESTION?

IV.

WHETHER THE RECOGNIZED EXCEPTIONS TO THE NATIONAL BANK ACT ARE APPLICABLE TO THIS CASE AND SUPPORT THE DECISION BELOW?

STATEMENT OF THE CASE AND FACTS*

On November 11, 1974, Plaintiffs, Sailboat Apartment Corporation, Carol Housing Corporation, Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally, filed this action against Chase Manhattan Bank and the trustees of Chase Manhattan Mortgage & Realty Trust, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

The complaint, in five counts, alleges that the Defendants failed to fund approximately 21 million of a 24 million dollar construction and development loan for land located in Dade County, Florida. Defendant, Chase Manhattan Mortgage & Realty Trust, holds a mortgage on that land, which is located in the City of Hialeah, Florida.

The legal bases of the action are breach of contract, fraud, and usury. In addition to damages, Plaintiffs seek specific performance of the contract, as well as an injunction against foreclosure.

In essence, the suit seeks to preserve Plaintiffs' ownership of local property. That ownership is jeopardized by Defendants' failure to fund its commitment.

An interlocutory appeal was taken by Chase Manhattan Bank from the trial court's order of March 13, 1975, denying the Bank's motion to quash and dismiss for improper venue.

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*In this brief, the following symbol will be used:
(PB) Petitioner's Brief

On July 29, 1975, the Third District Court of Appeal of Florida denied the interlocutory appeal and affirmed the trial court's order denying the Bank's motion to dismiss.

On October 14, 1975, the Bank filed a petition for writ of certiorari in the Supreme Court of Florida. On April 30, 1976, the petition was denied for lack of jurisdiction.

The Bank's petition to this Court ensued.

ARGUMENT

I.

THE FLORIDA INTERMEDIATE APPELLATE COURT'S AFFIRMANCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER WHICH DENIED PETITIONER'S MOTION TO DISMISS IS NOT A FINAL JUDGMENT OR DECREE PURSUANT TO TITLE 28, U.S.C. §1257.

It is axiomatic that in order to be final, a state court judgment or decree:

> . . . must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court. *Market Street R.Co. v. Railroad Commission*, 324 U.S. 548, 551 (1944).

In the present case, the decision affirming the trial court's denial of Defendant's motion to dismiss Plaintiffs' complaint is merely interlocutory. The decision below has made no final disposition of the litigation or any part thereof. The sole effect of the decision affirming the denial of Defendant's motion to dismiss is procedural and clearly it is only an intermediate step in this litigation, requiring Defendant to answer Plaintiffs' complaint. Defendant is still free to assert its venue privilege under the National Bank Act as an affirmative defense which can be determined on its merits at trial or by summary judgment where facts can be applied to law.

In the present context, Defendant moved to dismiss Plaintiffs' complaint with prejudice solely as a matter of law on the grounds that the National Bank Act, Title 12 U.S.C. §94, exempts Defendant from being sued outside of the state in which it is established by law. However, the factual basis of Plaintiffs' complaint includes assertions which invoke recognized exceptions to the National Bank Act, Title 12, U.S.C. §94: waiver and the local nature of the action.[1] The Florida Rules of Civil Procedure require the allegations of Plaintiffs' complaint to be deemed true for purposes of determining the validity of a motion to dismiss. See, *e.g.*, *Cape Cave Corp. v. Adams Construction Corp.*, 256 So.2d 413 (2d Fla DCA 1972); *Cravero Home Building Co. v. Jaffe*, 142 So.2d 342 (3d Fla DCA 1962). Deeming the allegations in Plaintiffs' complaint true for purposes of testing Petitioner's motion to dismiss, the trial court properly denied Defendant's motion to dismiss.

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[1] A summary of the applicable exceptions to the venue act as they apply to this case are presented below at Pages 12-20.

Throughout its succession of appeals, Petitioner has been oblivious to the procedural nature of a motion to dismiss and to the requirement that the facts alleged in the complaint are deemed true for the purposes of the motion. Even its petition to this Court disputes facts rather than law, as is clear from Petitioner's argument that Plaintiffs' complaint was "unsupported" and "unverified". (PB 8-9).

In Florida, as under the Federal Rules of Civil Procedure, there is no requirement that a complaint be "supported" or "verified". Pursuant to Florida Rule of Civil Procedure 1.030, "the signature of an attorney shall constitute a certificate by him that he has read the pleading [and] that to the best of his knowledge, information and belief, there is good ground to support it".

In summary, the law is clear that where the order appealed from merely denied Defendant's motion to dismiss Plaintiffs' complaint, and made no final conclusive disposition on the merits, finality is lacking. See *McComb v. Commissioners*, 91 U.S. 1 (1876); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-611 (1892); *Clark v. Kansas City*, 172 U.S. 334 (1898); *Missouri & Kansas R. Co. v. Olathe*, 222 U.S. 185 (1911); *Rutherford v. Fisher*, 4 Dall. (4 U.S.) 22 (1800). See also, *Cincinnati St. R. Co. v. Snell*, 179 U.S. 395 (1900).

In the face of the overwhelming authority cited above, Petitioner incorrectly cites 28 U.S.C. §1257(2) as its jurisdictional basis for a writ of certiorari where that subsection applies only to appeals regarding state statutes as opposed to writs of certiorari regarding federal statutes, and moreover, clings to *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), as its sole case in support of jurisdictional finality. (PB 2). However, neither the statutory subsection nor the cited case is on point.

In *Mercantile National Bank, supra*, this Court ruled that the requisite finality existed where the question on appeal was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's causes of action". 371 U.S. at 558.

In that case, this Court found "a separate and independent matter" because the sole question was the purely legal issue of whether federal or state law applied:

> . . . it being agreed that the only issue for review was whether 12 U.S.C. §94 entitled appellants to have the action transferred to the state court in Dallas County or whether the state venue provision in §4(f) of the [Texas] Insurance Code was controlling . . . 371 U.S. at 557.

In *Mercantile National Bank, supra*, this Court resolved the venue dispute between federal and state law as a matter of law with a stipulation that there was no need to consider any factual issues. In addition, this Court's ruling in that case provided a final disposition of the venue issue.

In the present case Petitioner could not rest upon a pure legal demurrer and rely solely on the superiority of the federal statute as was the case in *Mercantile National Bank, supra.*

To the contrary, in the present case the venue issue is totally enmeshed in the factual dispute between the parties. Whether one accepts the allegations in Plaintiffs' complaint or Petitioner's contrary unsupported factual arguments cited above, the issue of waiver of the venue privilege is not a "separate and independent matter", but is totally dependent upon the facts of this case. Therefore, it is "enmeshed in the factual and legal issues comprising the plaintiff's causes of action" and should not be subject to piecemeal review by this Court until the factual issues regarding waiver are finally resolved — not on an appeal from a motion to dismiss. See *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67-69 (1947); *Radio Station WOW v. Johnson*, 326 U.S. 120, 123-124 (1944); *Cf., Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Finally, it is respectfully submitted that any decision by this Court, finding Plaintiffs' complaint insufficient would not be definitive at this stage of the proceedings because Plaintiffs-Respondents could amend their complaint pursuant to the Florida Rules of Civil Procedure and satisfy the requirements of any or all of the recognized exceptions to the venue act.

Respondents suggest that this Court should not entertain this petition for certiorari on the grounds that there is no "final order or decree" pursuant to 28 U.S.C. §1257.

ARGUMENT

II.

THE DECISION BELOW MAY BE UPHELD BECAUSE IT IS BASED UPON ADEQUATE STATE GROUNDS.

In an effort to bootstrap itself into this Court's jurisdiction, Petitioner argues that the *per curiam* affirmance below is "impossibly" vague and prevents a determination of whether a federal question was actually decided. (PB 7). Therefore, Petitioner would have this Court impute the existence of a federal question where it is, at best, doubtful that one exists.

While Respondents might agree for purposes of argument that the full grounds of the decision below are in doubt, the law is clear that such doubt at this stage is fatal to Petitioner.

When the grounds of a decision are in doubt and the record deficient, Petitioner should obtain a certificate from the lower court reciting the grounds for the court's opinion. The certificate should be obtained in time to include it as part of the record filed simultaneously with the petition for writ of certiorari. See, *Ungar v. Sarafite*, 376 U.S. 575, 582 (1964); *Willner v. Committee on Character*, 373 U.S. 96, 102 (1963); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1936); *Whitney v. California*, 274 U.S. 357, 360-361 (1926).

Assuming *arguendo* that both federal and non-federal questions are properly raised in the record but no opinion

is delivered, or the grounds of the judgment are ambiguous, there must be an affirmative showing by the Petitioner that a decision on the federal question was necessary to a determination of the cause. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Woods v. Nierstheimer*, 328 U.S. 211 (1945); *Phyle v. Duffy*, 334 U.S. 431 (1946).

Moreover, this Court has stated where adequate state grounds are asserted and appear reasonable, "petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below". *Durley v. Mayo*, 341 U.S. 277, 281 (1955). See also, *Stembridge v. Georgia*, 343 U.S. 541, 547 (1951); *Ellis v. Dixon*, 349 U.S. 458, 459 (1954).

In the present case, Petitioner has made no attempt to meet its burden of showing that the determination of a federal question was necessary to the decision below. Additionally, Petitioner has made no attempt to reconcile the procedural context of the lower court's denial of its motion to dismiss, with its argument that a federal question was decided.

In short, from an ambiguous record and without seeking a certificate of clarification, Petitioner asserts that a federal question must have been decided by the appellate court in affirming the denial of its motion to dismiss. It is much more plausible that, under state law, the Court properly accepted the allegations of Plaintiffs' complaint as true, and found that the factual issues of waiver and estoppel must be decided before the federal question could be addressed.

Therefore, because the decision below may be upheld on independent and adequate state procedural grounds, this petition should be denied. See *Wood v. Chesborough*, 228 U.S. 672, 676-680 (1912); *West Chicago St. R. Co. v. Illinois ex rel. Chicago*, 201 U.S. 506, 579 (1905); *Chicago B. & Q. R. Co. v. People of Illinois ex rel. Commissioners*, 200 U.S. 561 (1906).

ARGUMENT

III.

PETITIONER HAS ASSERTED NO SUBSTANTIAL FEDERAL QUESTION.

As discussed previously, the decision below was a procedural ruling that did not necessarily bear upon any federal question.

In an effort to bootstrap itself into this Court's jurisdiction, Petitioner has presented a federal question which was not necessary to the decision below.

Where a federal question is "merely formal", it will be deemed insubstantial and is cause for dismissal of a petition for writ of certiorari. *Zucht v. King*, 260 U.S. 174 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1951).

A federal question is considered formal when the issues it raises are not disputed and already have been clearly decided by this Court. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

In the context of the present case, there is no dispute that Title 12, U.S.C. §94 is a mandatory statute. However, it has long been recognized that waiver and the local nature of the action are exceptions to the application of the National Bank Act. See, *e.g.*, *Casey v. Adams*, 102 U.S. 66 (1880); and *Radzanower v. Touche Ross and Co., et al.*, — U.S. —, 96 S.Ct. 89 (June 7, 1976). (For more complete discussion of the application of the National Bank Act, see Point IV below).

Although Petitioner raises a "federal issue", there is no question to be resolved by this Court from this interlocutory decision below.

Therefore, this Petition should be denied for lack of a substantial federal question.

ARGUMENT

IV.

RECOGNIZED EXCEPTIONS TO THE NATIONAL BANK ACT ARE APPLICABLE TO THIS CASE AND SUPPORT THE DECISION BELOW.

Petitioner bases its entire argument on the premise that the venue provision of 12 U.S.C. §94 is mandatory, and that "the lower federal courts have been unanimous in construing Section 94 as requiring that national banks be sued only in the district in which they are established". (PB 6).

A. *Waiver is a Recognized Exception to the Application of 12 U.S.C. §94 and Supports the Procedural Decision Below*

Title 12 U.S.C. §94 provides:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

It stands without citation that this statute is mandatory rather than permissive. However, it is equally well settled that the venue benefit conferred upon national banks by 12 U.S.C. §94 may be waived and such waiver will be considered on a case-by-case basis. *Charlotte National Bank v. Morgan*, 132 U.S. 141, 145 (1889); *Michigan National Bank v. Robertson*, 372 U.S. 591, (1963); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., et al*, — U.S. —, 96 S.Ct. 1632, 48 L.Ed.2d 92 (1976); *Radzanower v. Touche Ross and Co., et al.*, — U.S. —, 96 S.Ct. 89 (June 7, 1976). See also 1 ALR 3d 904 (1964), and Am. Jur., *Venue* (1st Ed.) §46.

As recently as June 7, 1976, this Court stated in *Radzanower v. Touche Ross and Co., et al., supra:*

> It has long been settled that the restrictive venue provisions of §94 can be *waived* by a defendant bank.

See, e.g., *Charlotte National Bank v. Morgan*, 132 U.S. 591, 594; *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, — U.S. —. (Emphasis supplied at fn. 3)

On a case-by-case basis, many courts have examined the factual context of a particular bank's activities and determined that a bank has waived its personal venue privilege for all claims arising out of that limited activity. *Buffum v. Chase National Bank of N.Y.*, 192 F.2d 58 (7th Cir. 1951); *Dolgow v. Anderson*, 45 FRD 470 (E.D.N.Y. 1968); *Lapinsohn v. Lewis Charles, Inc.*, 240 A.2d 90 (Pa. 1968) (conduct of general banking business manifests intent to be found in the jurisdiction); *Central Bank v. Superior Court of Sacramento*, 106 Cal.App. 962 (Ct.App. 1973) (full service branch subjected bank to jurisdiction and venue); *Lichtenfels v. North Carolina*, 132 SE2d 360, 363 (bank accepted appointment as testamentary trustee held accountable in forum where will probated); and *County of Okeechobee v. Florida National Bank*, 150 So. 124, 126 (Fla. 1933) (bank waived venue privilege by contracting with local county commissioners).

In *Buffum*, *supra*, Chase Bank had obtained leave to transact business in Illinois for the limited purpose of executing trusts. The Seventh Circuit found a limited waiver of venue to the extent of the business which the bank transacted in Illinois. The court held there was no waiver of venue in that case only because the plaintiff's claim did not arise out of the trust business which the bank had transacted in Illinois.

Under the facts alleged in the case at bar, Chase Bank has waived its privilege to the extent of being sued on its

local transaction and simultaneous tortious conduct in Florida[2]. Defendant has not contested the fact that it was present (transacting business) for the purposes of jurisdiction in Florida in this case[3].

As alleged in Plaintiffs' complaint, negotiations in this transaction took place in Miami, Florida[4]. In December, 1973, Kevin McCullagh, an officer of Chase, travelled to Miami to inspect the site of the project. While in Miami, he approved the site and negotiated numerous aspects of the transaction with officers of Appellees, Carol and Sailboat. At that time, McCullagh also requested Sailboat to prepare a cash flow analysis of the proposed project in Miami, Florida.

On May 2, 1974, McCullagh again met with Sailboat's officers and approved the preliminary plans which were submitted by Sailboat. This meeting, once again, was held in Miami. At this meeting, McCullagh also authorized Sailboat to proceed to working drawings and final engineering on the revised plans. As noted in the complaint (Appendix, ¶¶11 and 25), all of these activities took place in Miami, Florida. Therefore, consistent with case law cited above,

[2]This is especially true since while Buffum, supra, related to the mere transaction of business, the case at bar is one of alleged actual fraud, deceit and usury.

[3]Defendant, Chase Manhattan Bank, has neither moved to dismiss on the ground of lack of in personam jurisdiction, nor has it asserted lack of jurisdiction in its answer to the complaint.

[4]On the interlocutory appeals from orders denying motions to dismiss, all allegations in Appellees' complaint are deemed true. Cape Cave Corp. v. Adams Const. Corp., 256 So.2d 413 (2d Fla DCA 1972); Cravero Home Bldg. Co. v. Jaffe, 112 So.2d 312 (3d Fla DCA 1962).

All factual assertions made in this brief are supported by Plaintiffs-Respondents' complaint which is annexed to this brief as an Appendix.

and with the facts alleged in Plaintiffs' complaint, Chase may have waived its venue privilege to the extent of being sued on this single, local transaction involving the intentional torts of fraud and usury.

A cogent summary of the applicable case law which should be applied is provided in a recent law review article:

> The rationale behind these cases [waiver of the venue privilege] is that, where a national bank avails itself of a jurisdiction outside of the state, county or town of its principal office for the purpose of transacting business there, it has manifested an intent to be found in that jurisdiction and to be liable for any conduct arising out of the business it has done. The venue privilege limited suits to the place where the bank is established simply because this was where the bank was "found" — its records were there. Thus, the restrictive venue provisions would be unnecessary where the bank, by its actions manifests an intent to be found in another place.
>
> * * *
>
> As noted earlier, where a national bank is conducting *extensive business in another jurisdiction, or a limited business with an intention to be found in that jurisdiction to the extent of that business, it should be held to have waived the venue privilege for suit on its business activities there.* 34 Geo. Wash. L. Rev. 777, 778 (Emphasis supplied).

Therefore, it is clear that the trial court could have based its procedural ruling denying Defendant's motion

to dismiss on the ground that under the alleged facts of this case, Chase Bank may have waived its venue privilege to the extent that it transacted business and committed intentional torts in Florida against Respondents.

B. *The Nature of the Action*

The local nature of this action also supports, but is not necessary to, the lower courts' decision.

In the early case of *Casey v. Adams*, 102 U.S. 66, 26 L.Ed. 52 (1880), Adams & Company sued Casey as the receiver of a New Orleans national bank. The cause of action was for equitable relief: an order to show cause why a mortgage should not be erased from the records.

The Court held that this action for injunctive relief between creditors of a common judgment-debtor:

> . . . was clearly local in its nature. *It related to property* in the Parish of La Fourche, which had been seized and sold under process of the district court of that parish. 102 U.S. at 68 (Emphasis supplied).

As in *Casey*, this action is clearly local in nature — it relates only to local property. Count five of plaintiffs' complaint seeks an injunction restraining foreclosure of land in Dade County, Florida, and the prayer seeks an injunction and other appropriate relief relating, *inter alia*, to the mortgage. Moreover, count three purposely requests specific performance of the loan agreement so that the local *res*, the land, may be preserved for the plaintiffs.

In addition, Defendant, Chase Manhattan Mortgage and Realty Trust, the bank's alleged alter ego, has counterclaimed for foreclosure. Under Florida venue law, foreclosure actions are "local" and must be heard in the county where the land is situated. *Georgia Casualty Co. v. O'Donnell*, 147 So. 267 (Fla. 1933); *Sales v. Berzin*, 212 So.2d 23 (4th Fla. DCA 1968); *Cohen v. Century Ventures*, 163 So.2d 799 (2d Fla. DCA 1964).

This "local nature of the action" exception to the federal venue statute has continued to be applied uniformly as the recognized law since *Casey v. Adams, supra.* It has been most recently applied in *Chateau Lafayette Apts., Inc. v. Meadowbrook National Bank*, 416 F.2d 301 (5th Cir., 1969). There, the court stated clearly that the National Bank Act does *not* apply in "an action 'to assert an interest in immovable property, or a right in, to, or against immovable property' ". The court went on to state:

> Moreover, the *effect* of the remedies sought in *Casey* and the one claimed here virtually were the same. In *Casey*, complete cancellation and erasure of secured mortgages on immovable property was sought; here, although the action arose under circumstances not exactly the same as those in *Casey*, total or partial cancellation, reformation, and erasure of a mortgage on immovable local property is sought. 416 F.2d at 304. (Emphasis supplied).

The effect of the remedy sought in the case at bar is the same as *Casey, supra*, or *Chateau Lafayette, supra.* It is a suit "to assert an interest in immovable property or a right in, to or against immovable property".

In holding that the "local nature of the action" exception to the National Bank Act applied in *Chateau Lafayette, supra*, the Fifth Circuit discussed the nature of a local action and summed up the relationship between the relief sought and the nature of the action:

> Each depends upon the other; and one of the primary effects, if Appellee ultimately prevails, will be upon the real property subject to the mortgage. 416 F.2d at 305.

Moreover, as this Court stated in *Michigan National Bank v. Robertson*, 372 U.S. 591, 594 (1963), a local action is "one to determine interests in property as its situs . . ." That effect is precisely the nature of the case at bar. If plaintiffs ultimately prevail, one of the primary effects of their judgment will be to enjoin defendants from foreclosing on the real property which is the subject of the mortgage in this action. In addition, that judgment will determine the interests in Florida property at its situs.

Chase Bank's argument that this case should be treated differently from *Casey* and *Chateau Lafayette* is untenable. In Florida, every prayer for relief is treated as a prayer for general relief. See Fla.R.C.P. 1.110(b), *Super Service Products Corp. v. North Store Corp.*, 214 So.2d 664 (3d Fla. DCA 1968); *Davidson v. Lely Estates, Inc.*, 330 So.2d 528 (2d Fla. DCA 1976). In the present case, Plaintiffs-Appellees have specifically prayed for general relief and, therefore, the court could in its discretion, grant "erasure of the mortgage from the public records" as was granted in the prior cited cases. This possibility demonstrates the absurdity of Defendant's argument,

which stresses the formal jurisdictional basis rather than substance. Erasure of a mortgage can be done only on the local public records at the situs of the property.

As a practical matter, even if the trial court were to deny Plaintiffs the technical relief of "erasure" and, therefore, necessitate dismissal under Chase Bank's view of the law, it would only serve to delay a decision on the merits, since Plaintiffs-Respondents could immediately refile this action and request the relief of "erasure". See e.g. *Chateau Lafayette, supra,* where Plaintiff's *amended* complaint sought erasure.

Therefore, it is not only clear legally that the applicable standard is the nature of the action rather than the relief sought or the formal jurisdictional basis, but it is also clear practically that the only result which could be obtained from reversing the lower courts' decisions in this matter would be to delay the action and require Plaintiffs to file an amended complaint.

CONCLUSION

This Court should deny this Petition for Writ of Certiorari on the grounds that there has been no final judgment or decree; the decision below may be upheld on adequate state grounds; Petitioner has asserted no substantial federal question; and recognized exceptions to the bank venue act are applicable to this case and support the decision below.

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Copies mailed to counsel, September 24, 1976.

APPENDIX

APPENDIX
Plaintiffs' Complaint

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

NO. 74-32594

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs,

vs

CHASE MANHATTAN BANK, a New York national banking association, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE & REALTY TRUST, a Massachusetts business trust,

Defendants.

COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES, FOR BREACH OF CONTRACT, FOR FRAUD, FOR SPECIFIC PERFORMANCE, FOR DECLARATION OF RIGHTS AND OTHER RELIEF

Sailboat Apartment Corp., a Florida corporation ("Sailboat"), Carol Housing Corporation, a Florida corporation ("Carol"), Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally, sue Chase Manhattan Bank, a New York national banking association ("Chase"), Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank P. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose and Charles M. Williams, as Trustees of Chase Manhattan Mortgage & Realty Trust, a Massachusetts business trust ("Realty Trust"), jointly and severally, and allege:

1. This is a claim for damages in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs and for equitable relief.

2. Sailboat is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Florida, headquartered at 9200 South Dadeland Boulevard, Miami, Dade County, Florida; it is the wholly-owned subsidiary of Carol, and was formed initially in order to commence and prosecute the project noted hereafter.

3. Carol is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Florida, headquartered at 9200 South Dadeland Boulevard, Miami, Dade County, Florida.

4. Stephen Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida. At all times material to this Complaint, Stephen Kapelow has been president of Sailboat.

5. Paul Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida.

6. Hester Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida.

7. Chase is a national banking association with its principal place of business in New York, New York, and otherwise with its principal place of business not in Florida.

8. Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank F. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose and Charles M. Williams are the Trustees of Realty Trust, which is a Massachusetts business trust purporting to have its principal place of business at One Boston Place, Boston, Massachusetts, but in any event with its principal place of business not in Florida.

9. In November, 1973, Carol submitted an "application for land acquisition, development and construction loan", annexed and made a part of this Complaint as Exhibit 1, to Realty Trust for $23,000,000 with which to acquire, develop and build "Sailboat Village", a 1008-unit condominium project to be located on Northwest 103rd Street in Hialeah, Dade County, Florida.

10. After extensive negotiations, both directly and indirectly through Pearce Mayer & Greer, Inc. ("PM&G"), a New York brokerage firm, all of which negotiations took place in New York, New York, or in Dade County, Florida, and none of which occurred in Boston, Massa-

chusetts, Realty Trust indicated that Realty Trust was willing to consider Carol's application, but requested Sailboat submit a "good faith" deposit of $100,000.

11. In December, 1973, Kevin McCullough, an officer of Chase, traveled to Miami to inspect the site of the project and, while in Miami, approved the site and negotiated numerous aspects of the transaction with officers of Carol and Sailboat. He requested and Carol provided a cash-flow analysis of the proposed project, which is annexed and made a part of this Complaint as Exhibit 2.

12. In reliance upon the foregoing, on December 19, 1973, Carol caused the City National Bank of Miami, Florida, to issue an irrevocable letter of credit in the amount of $100,000, payable to Chase (not to Realty Trust). This letter of credit is annexed as Exhibit 3 and made a part of this Complaint.

13. On December 20, 1973, Chase advised PM&G that Carol's application was approved but in the amount of $24,000,000 rather than $23,000,000. PM&G so informed Carol and Sailboat and the irrevocable letter of credit was mailed to PM&G for delivery to Chase on December 20, 1973.

14. On January 14, 1974, Realty Trust issued its commitment letter. A copy of the commitment letter is annexed as Exhibit 4 and made a part of this Complaint. The commitment letter itself annexed and incorporated Realty Trust's "general conditions of construction loan commitment", which is also a portion of annexed Exhibit 4.

15. The terms of the commitment by Realty Trust are set forth in outline as follows:

> "We agree to lend up to $24,000,000 . . . of which (a) $2,450,000 (the Land Loan) is to be advanced to finance the acquisition of the Premises, (b) up to $2,650,000 (the Land Development) is to be advanced for the construction and performance of the land development work . . . and (c) up to $18,900,000 (the Construction Loan) is to be advanced for construction on the Premises of . . . (the Improvements) consisting of (i) 1008 condominium units housed in 3- and 5-story elevator serviced buildings, and (ii) on-site parking for 1512 cars, all of which construction shall be undertaken in several phases and all of which construction shall be completed within 60 months."

16. The higher $24,000,000 figure was required by Chase and represented a $1,000,000 increase to the initial proposed interest reserve.

17. On or about March 12, 1974, Sailboat's officers made their only visit to Massachusetts, to a small suite of offices located at One Boston Place in Boston, Massachusetts, and with apparently authorized agents of Realty Trust, signed the following:

(a) Building Loan Mortgage, annexed as Exhibit 5 and made a part of this Complaint;

(b) Building Loan Agreement, annexed as Exhibit 6 and made a part of this Complaint;

(c) a Note labeled both "Construction Note" and "Land Loan Note" dated March 12, 1974, in the principal amount of $2,313,000 at 4½% over floating prime. A copy of the said note is annexed as Exhibit 7 and made a part of this Complaint.

18. In connection with the foregoing, Carol, Stephen Kapelow, Paul Kapelow and Hester Kapelow were induced to sign in Miami a 'Completion Guarantee' purporting in Paragraph 2

> "unconditionally [to] guarantee . . . the due performance of all . . . [Sailboat's] obligations under the Building Loan Agreement and the Mortgage, including its obligations for the payment of all legal and other costs or expenses paid or incurred . . . in the enforcement thereof against . . . [Sailboat] or us."

A copy of the said Completion Guarantee is annexed as Exhibit 8 and made a part of this Complaint.

19. At no time did either Paul Kapelow or Hester Kapelow travel to Boston or to New York in reference to this matter and they signed the papers set forth in the preceding paragraph in Miami, Dade County, Florida.

20. Both the Note and the Completion Guarantee incorporate the Building Loan Agreement by reference. Among other things, the Building Loan Agreement includes the following language:

> "The Land Development Loan shall further provide for the payment of Additional Interest in the

> amount of $100,000 if . . . [Sailboat] does not apply and qualify for all of the Building Loan."

21. Notwithstanding all of the foregoing, on March 12, 1974, Realty Trust declined to fund more than $2,313,000 previously noted, but represented that the remainder of the initial two phases of the loan would be funded shortly. In point of fact, the documents executed as noted in Paragraph 17 above constituted all of the documents necessary for closing the entire first two phases of the loan except for an additional promissory note (and routine, concomitant extension and consolidation agreements).

22. Even prior to the closing of the loan in March, 1974, and as early as January, 1974, Sailboat and Carol had come to the conclusion that a revised site plan with different configurations and a lower number of units would be more advantageous than that initially made a part of the application for funding. Chase was made aware of these conclusions as early as January, 1974, assented to them and requested revised cost breakdowns and revised site plan drawings.

23. After the loan closing, Sailboat complied with Chase's request for such revisions and in April, 1974, notified Chase that revised site plan drawings, preliminary architectural plans and revised cost estimates were ready for inspection. Chase responded that Kevin McCullough would be in Miami on May 2, 1974, to conduct such an inspection.

24. During April, 1974, contrary to the representations Realty Trust had made to Sailboat's officers, Chase insisted and demanded that interest on the initial land

acquisition loan be paid because Chase had represented to Sailboat's officers that the second phase or development loan would be closed in only a few weeks. Both because Chase had represented that the funding of the second phase was but a short time away and because Sailboat had no bargaining strength at the time, Sailboat was forced to agree to pay interest until the development loan was funded.

25. On May 2, 1974, McCullough met with Sailboat's officers and approved on behalf of Chase the preliminary plans submitted. At this meeting in Miami, McCullough also authorized Sailboat to proceed to working drawings and final engineering on the revised plans. Later in the day, McCullough advised Sailboat's officers that Chase's appraiser also approved the revised plans.

26. On May 3, 1974, in reliance upon Chase's instructions as aforesaid, Sailboat authorized and commenced work towards complete and final working drawings on the revised project.

27. On May 20, 1974, Sailboat mailed to Chase a revised cost analysis which had been requested by McCullough.

28. Thereafter, Chase's consulting engineers, DiStasio and Van Buren, during the months of May, June, July, August and September, 1974, erroneously and with great delay failed expeditiously to complete their approvals of the revised plans. Throughout the same period, Defendants otherwise continued both by direct representation and by omission to make a contrary statement to induce Sailboat to believe that both phases 2 and 3 would be funded. Sail-

boat not only forebore from seeking other funding but, by virtue of Realty Trust's first mortgage, was unable to obtain any other funding for the project.

29. On September 13, 1974, Chase arbitrarily and unilaterally decided that the $1,000,000 interest reserve which Chase itself had built into the $24,000,000 loan commitment was 'no longer sufficient" and indicated that an additional interest reserve would be required.

30. Despite Sailboat's complete performance of all conditions precedent and all of its obligations which Chase permitted it to complete, on October 4, 1974, Chase had not only failed to approve and commence funding on the construction loan but had failed to conclude the land development loan (or phase 2 of the commitment).

31. Chase's refusal to complete the funding of the land development loan (i.e. second phase) rendered Plaintiffs' acceptance of funding for the land acquisition loan (or first phase) not only uneconomical but financially disastrous. As Chase knew, Plaintiffs were required, in order to accept the land acquisition funding, to pay off favorable purchase money mortgage notes with low interest rates and good terms and to replace such loans with Chase's high interest rate land acquisition loan. Sailboat therefore found itself with a ruinously high debt load and with no ability to obtain additional funding for development from sources other than Chase, since second mortgage money or total refinancing had become prohibitively expensive. Sailboat was therefore rendered unable even to improve the land for resale and found (and finds) itself locked into a loss position from which it is unable to extricate itself without re-

quiring Realty Trust at least to complete the land development portion or second phase of Realty Trust's commitment.

32. As part of the March 12, 1974, transaction, certain funds were withheld by Chase and placed in an escrow account. On or before October 23, 1974, Chase demanded that $40,900 of that escrow account money be applied to the interest due on the land acquisition loan. By letter dated October 23, 1974, and annexed and made a part of this Complaint as Exhibit 9, Sailboat authorized Chase to use the escrow monies and apply the same towards interest on the loan, but Sailboat authorized the same without prejudice to its rights.

33. By letter purporting to be dated October 18, 1974, but not received until October 25, 1974, and annexed and made a part of this Complaint as Exhibit 10, notwithstanding the written authorization by Sailboat to apply escrow monies to interest as aforesaid, Realty Trust purported to accelerate and demand repayment of the entire loan previously funded to Sailboat.

34. Moreover, at all times material to this Complaint, Chase's actions and activities were so clearly on behalf of Chase itself rather than as a putative "advisor" to Realty Trust that it became clear that Realty Trust has been either formed or used or both by Chase as a sham entity to avoid application of national, New York, Massachusetts, and/or Florida laws. In fact, the entire loan transaction and breach of the same and all of the misstatements and omissions to make material statements to Plaintiffs are the direct responsibility of Chase and Chase and/or Realty Trust should be required to respond therefor.

COUNT I

CLAIM FOR BREACH OF CONTRACT

35. Plaintiffs reallege Paragraphs 1 through 34, inclusive.

36. At all times material to this Complaint, Plaintiffs performed all conditions precedent required of them by the contracts, or were directly and deliberately prevented from being performed by Chase and/or by Realty Trust.

37. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

38. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, pre-judgment interest, attorneys' fees and costs.

COUNT II

CLAIM FOR SPECIFIC PERFORMANCE

39. Plaintiffs reallege Paragraphs 1 through 38, inclusive.

40. Plaintiffs stand ready, willing and able to complete the said project, have no adequate remedy at law, and are entitled to have Defendants specifically and in good faith perform each and every obligation to fund the second and third phases of its said contracts.

COUNT III

CLAIM FOR FRAUD

41. Plaintiffs reallege Paragraphs 1 through 40, inclusive.

42. Moreover, at the time Realty Trust and its agents and servants, employees and representatives, all acting within the course and scope of their employment and authority, made the foregoing representations and inducements to Sailboat and to Carol and the Kapelows, Realty Trust's said agents (a) knew that the representations were false and that Realty Trust would and/or could not fund the Land Development Loan or the Building Loan, (b) did not know whether Realty Trust would or could honor its commitments under the said documents or (c) should have known if they did not know, that Realty Trust would not or could not perform as they represent it would.

43. As a result of Realty Trust's actions as aforesaid, Sailboat, having foreborne to obtain financing elsewhere, is now unable to obtain alternative financing and is left with ownership of undeveloped land subject to a first lien to Realty Trust in the amount of $2,450,000 at the excessive interest rate as aforesaid and is unable to proceed in any way with the projected "Sailboat Village" project.

44. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

45. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, pre-judgment interest, attorneys' fees and costs.

46. Defendants' said conduct was in gross disregard of Plaintiffs' rights, and Defendants are therefore liable to Plaintiffs for punitive damages.

COUNT IV

CLAIM FOR USURY

47. Plaintiffs reallege Paragraphs 1 through 46, inclusive.

48. In addition to the foregoing, the combination of the 4½% interest rate over floating prime, the $100,000 additional interest which appears to be asserted as due under the Building Loan Agreement and a floating prime itself in excess of 11½ to 12½%, has resulted in a contract by Sailboat to pay interest to Realty Trust at rates in excess of 15% in violation of Florida Statutes, Chapter 687, entitling Sailboat to the return of all interest paid on the said Land Loan. Moreover, as a result of the foregoing, Sailboat has lost its projected profits on the said development and stands in jeopardy of losing its entire investment.

49. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

50. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, prejudgment interest, attorneys' fees and costs.

51. Defendants' said conduct was in gross disregard of Plaintiffs' rights, and Defendants are therefore liable to Plaintiffs for punitive damages.

52. In addition to the foregoing and pursuant to Florida Statutes §687, Plaintiffs are entitled to require Defendants to refund and pay over to Plaintiffs all interest heretofore paid on that portion of the loan which has been funded.

COUNT V

CLAIM FOR INJUNCTION AND DECLARATION OF RIGHTS

53. Plaintiffs reallege Paragraphs 1 through 52, inclusive.

54. Should Defendants be permitted wrongfully to accelerate the said loan, wrongfully to refuse to fund the remaining portions of the said loan and to foreclose on the real property owned by Sailboat, Plaintiffs and each of them would suffer irreparable damage and are entitled to temporary and permanent injunctions against Defendants' threatened acceleration and foreclosure.

55. In the alternative and at the very least, Plaintiffs are in doubt as to their legal rights under the contracts referred to above and are entitled to a declaration of their rights under the same. Among other things, the Kapelows and Carol are in doubt as to any obligations they have or may have under Paragraph 2 of Exhibit 8 referred to in Paragraph 18 of this Complaint. Moreover, Sailboat

is in doubt as to any obligation it may have to respond for "Additional Interest" pursuant to that portion of Exhibit 6 referred to in Paragraph 20 of this Complaint.

WHEREFORE, Plaintiffs, jointly and severally, demand judgment from Defendants, jointly and severally, for compensatory damages in excess of $10,000,000, for punitive damages in excess of $10,000,000, for pre-judgment interest, for attorneys' fees, for costs, and in the alternative, for specific performance of Defendants' obligations to fund the entire $24,000,000 but at a rate not to exceed 15% pursuant to Florida public policy, as enunciated in Chapter 687, Florida Statutes, for declarations that Carol and the Kapelows have no obligation whatever under Paragraph 2 of Exhibit 6, or a declaration that no "Additional Interest" may be required to be paid under that portion of Exhibit 6 referred to in Paragraph 20 of this Complaint, for preliminary and permanent injunctions against foreclosure and acceleration, and for such other and further relief as may be meet and proper under the circumstances.

DATED this 11th day of November, 1974.

PETTIGREW & BAILEY
Attorneys for Plaintiffs
1820 One Biscayne Tower
Miami, Florida 33131

By /s/ Guy B. Bailey, Jr.
Guy B. Bailey, Jr.

Supreme Court, U. S.
FILED
OCT 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 76-126

THE CHASE MANHATTAN BANK, a New York national banking association,

Defendant-Petitioner

—against—

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs-Respondents

AND

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,

Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INDEX

		PAGE
I.	This Court has jurisdiction to review the Florida Court's failure to apply or misapplication of Section 94 of the National Bank Act	1
II.	The decision below raises only federal issues	4
III.	The facts alleged in the complaint do not constitute waiver	4
IV.	This action is a transitory action which can be brought against Chase only in New York	7
	CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	PAGE
Buffum v. *Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952)	4, 5
Casey v. *Adams*, 102 U.S. 66 (1880)	4, 7
Charlotte National Bank v. *Morgan*, 132 U.S. 141 (1889)	5
Davis v. *O'Hara*, 266 U.S. 314 (1924)	4
Fisher v. *First National Bank of Omaha*, 338 F.Supp. 525 (S.D. Iowa 1972), *app. dismissed*, 466 F.2d 511 (8th Cir. 1972)	5, 6
Helco, Inc. v. *First National City Bank*, 470 F.2d 883 (3d Cir. 1972)	4, 5, 7
Insurance Company of North America v. *Allied Crude Vegetable Oil Refining Corporation*, 89 N.J. Super. 518, 215 A.2d 579 (N.J. Super. 1965)	6
Lichtenfels v. *North Carolina National Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963)	5
Local No. 438 Construction & General Laborers Union, AFL-CIO v. *Curry*, 371 U.S. 542 (1963)	3
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963)	3, 4, 6
Michigan National Bank v. *Robertson*, 372 U.S. 591 (1963)	4, 7
National Bank of North America v. *Associates of Obstetrics and Female Surgery, Inc.*, ____ U.S. ____, 96 S.Ct. 1632, 48 L.Ed.2d 92 (April 26, 1976)	2, 3 4, 7, 8
Northside Iron & Metal Co., Inc. v. *Dobson & Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973)	6
Prince v. *Franklin National Bank*, 62 Misc.2d 855, 310 N.Y.S.2d 390 (Sup. Ct. Nassau Co. 1970)	6

	PAGE
Radzanower v. *Touche, Ross & Co.*, ____ U.S. ____, 96 S.Ct. 1989, 48 L.Ed.2d 540 (June 7, 1976)	8
Rome v. *Eltra Corp.*, 297 F.Supp. 314 (E.D.Pa. 1969)	6
Sulil Realty Corp. v. *Rye Motors, Inc.*, 45 Misc.2d 458, 257 N.Y.S.2d 111 (West.Co.Ct. 1965), *aff'd*, 47 Misc.2d 715, 262 N.Y.S.2d 989 (2d Dep't 1965)	6
Tanglewood Mall, Inc. v. *Chase Manhattan Bank*, 371 F.Supp. 722 (W.D. Va. 1974), *aff'd*, 508 F.2d 838 (4th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975)	7
Williams v. *Kaiser*, 323 U.S. 471 (1945)	4

Statutes

Section 94 of the National Bank Act, 12 U.S.C. § 94	*passim*
28 U.S.C. § 1257	3

Rules

Rule 19.1(a), Rules of The Supreme Court of the United States	2

In The

Supreme Court of the United States

October Term, 1975

No. 76-126

The Chase Manhattan Bank, a New York national banking association,

Defendant-Petitioner

—against—

Sailboat Apartment Corp., a Florida corporation, Carol Housing Corporation, a Florida corporation, Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally,

Plaintiffs-Respondents

AND

Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank F. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose, and Charles M. Williams, as Trustees of Chase Manhattan Mortgage and Realty Trust, a Massachusetts business trust,

Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

This Court has jurisdiction to review the Florida Court's failure to apply or misapplication of Section 94 of the National Bank Act

Respondents' argument—that the Court lacks jurisdiction because of the absence of finality—falls by its own

weight. Respondents argue that Chase must await trial in Florida for a determination of Chase's right not to be tried in Florida. Respondents contend that a trial or a summary judgment proceeding is necessary because the venue issue cannot be determined without fact-finding by the Florida court. Yet, respondents cite the Florida rule that the allegations of the complaint must be taken as true. The petition (Pet.[1] 9-10) also recognized this rule. Since that is so, no issue of fact remains to be tried on the venue question. Chase is a national bank located in New York. The allegations of the complaint are deemed true. The point is, as the petition shows (Pet. 9-10), that no facts even approaching an exception to Section 94 of the National Bank Act are pleaded in the complaint. (Br.[2] Appendix)

Only five months ago, in *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc.*, ____ U.S. ____, 96 S.Ct. 1632, 48 L.Ed.2d 92 (April 26, 1976), this Court granted certiorari and vacated the judgment below which had denied a motion to dismiss in a virtually identical situation. There, as here, a state court refused to follow this Court's repeated direction that a national bank must be afforded its Section 94 right of being sued only where it maintains its principal office.[3]

The federal question here is the same as that presented in *National Bank of North America:* the power of a state court to proceed with and determine an action against

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[1] "Pet." refers to the designated pages of the Petition.

[2] "Br." refers to designated pages of Respondents' Brief in Opposition to the Petition.

[3] Rule 19.1(a) of the Rules of this Court provides that a consideration in determining whether to review a state court's order is whether the state court has decided a federal question of substance, " . . . [I]n a way probably not in accordance with applicable decisions of this court."

a national bank which, under the direction of Congress, can only be sued elsewhere.[4] Despite respondents' assertions to the contrary (Br. 4-8), by plain logic and by case law, the Florida court's refusal to dismiss this action against Chase is a "final judgment or decree" reviewable now by this Court under 28 U.S.C. § 1257. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) ("... we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."); *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963).[5]

The issue of whether Chase is liable to respondents on the merits is separate and independent from the issue of whether that liability is determined by a New York or a Florida court. *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry, supra.*

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[4] By order dated September 21, 1976, the Florida trial court has set the trial to begin on March 7, 1977.

[5] Respondents point (Br. 6-7) to a typographical error in the petition (Pet. 2, n. 2) where 28 U.S.C. § 1257(2) is cited as the basis for this Court's jurisdiction. The citation, as shown by the language of the Petition (Pet. 2, n. 2), should be 28 U.S.C. § 1257(3), which affords jurisdiction and provides, in relevant part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question . . . , or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

II

The decision below raises only federal issues

The only question presented to the Florida court, and the only question on which it could rule, was whether Section 94 prohibited this action against Chase in Florida. The Florida court denied the motion to dismiss. That decision can be based on only two possible grounds. The Florida court either refused to give effect to Section 94, or misapplied it by finding that Chase waived or that the action was local. All possible grounds for the decision present federal and only federal questions, reviewable now by this Court. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Mercantile National Bank* v. *Langdeau, supra; Michigan National Bank* v. *Robertson,* 372 U.S. 591 (1963); *Davis* v. *O'Hara,* 266 U.S. 314 (1924); *Casey* v. *Adams,* 102 U.S. 66 (1880). Since only federal questions are presented, and there are no substantial state grounds on which the decision below could be based, this Court will accept jurisdiction absent an opinion by the court below. *Williams* v. *Kaiser,* 323 U.S. 471 (1945).

III

The facts alleged in the complaint do not constitute waiver

Waiver is the voluntary and intentional relinquishment or abandonment of a known existing right. Respondents have the burden of showing that Chase voluntarily and intentionally relinquished or abandoned its right to be sued only in New York. *Buffum* v. *Chase National Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *Helco, Inc.* v. *First National City Bank,* 470 F.2d 883 (3d Cir. 1972). Where, as here, the only proof of Chase's intention to waive rests on its alleged conduct, Chase's actions must be so manifestly consistent with and indicative of an intention to relinquish voluntarily its right to be sued in

New York that no other reasonable explanation for Chase's conduct is possible. *Buffum* v. *Chase National Bank, supra* at 61; *Helco, Inc.* v. *First National City Bank, supra.*

Two visits to Florida by a junior officer of Chase as an investment advisor to a Massachusetts real estate investment trust with respect to the trust's investment in Florida land (Br. 15)—which is all the complaint alleges—is not conduct which can only be explained as an intentional abandonment by Chase of its right to be sued only in New York. Such conduct, involving a transaction to which Chase was not even a party, is far different from the conduct which courts have required to find an intention to relinquish Section 94 rights.

With few exceptions, where an intention to waive Section 94 rights has been found, as in the cases cited by respondents (Br. 14), the actions evidencing the intention have been clear and unequivocal. Consonant with the *Buffum* standard, the only reasonable explanation for the conduct was an intention to waive Section 94, such as defending a lawsuit without objecting to venue until the case reached the appellate court, *Charlotte National Bank* v. *Morgan,* 132 U.S. 141 (1889), or accepting appointment as testamentary trustee subject to a court's supervision, *Lichtenfels* v. *North Carolina National Bank,* 260 N.C. 146, 132 S.E.2d 360 (1963).

On the other hand, conduct such as is alleged here, involving an isolated transaction far from the place where the bank carries on its normal business, is hardly such that it could only be explained as manifesting an intention to be sued in the distant forum. In cases such as this, lower courts, both state and federal, hold that mere transaction of business is not equivalent to consent to be sued. *Helco, Inc.* v. *First National City Bank, supra* (doing business through one branch office was not sufficient to show waiver); *Fisher*

v. *First National Bank of Omaha,* 338 F.Supp. 525 (S.D.Iowa 1972), *app. dismissed,* 466 F.2d 511 (8th Cir. 1972) (operation of credit card plan did not amount to waiver); *Rome* v. *Eltra Corp.,* 297 F.Supp. 314 (E.D.Pa. 1969) (accepting appointment as indenture trustee was not a waiver); *Prince* v. *Franklin National Bank,* 62 Misc.2d 855, 310 N.Y.S.2d 390 (Sup. Ct. Nassau Co. 1970) (custody and sale of stocks allegedly converted did not amount to waiver); *Insurance Company of North America* v. *Allied Crude Vegetable Oil Refining Corporation,* 89 N.J. Super. 518, 215 A.2d 579 (N.J.Super. 1965) (securing loans on property within the foreign jurisdiction was not waiver); *Sulil Realty Corp.* v. *Rye Motors, Inc.,* 45 Misc.2d 458, 257 N.Y.S.2d 111 (West. Co.Ct. 1965), *aff'd,* 47 Misc.2d 715, 262 N.Y.S.2d 989 (2d Dep't 1965) (repossessing and selling pledged property and financing automobiles was not a waiver).

Respondents suggest (Br. 15) that because Chase's actions may have been sufficient for the exercise of *in personam* jurisdiction by the Florida court, those actions are sufficient to waive Chase's Section 94 rights. Waiver of Section 94 rights cannot be equated with tortious conduct, as respondents suggest (Br. 15-16), for the commission of a tort does not evidence an intent to be sued where the tort is committed. *Northside Iron & Metal Co., Inc.* v. *Dobson & Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973); *Fisher* v. *First National Bank of Omaha, supra; Prince* v. *Franklin National Bank, supra.* If respondents' argument were correct, it would mean that any time a national bank has established minimum contacts with the forum state, so that due process requirements for the exercise of jurisdiction are satisfied, waiver of Section 94 would be automatic. If that were the case, the waiver exception to Section 94 would swallow the statute. In fact, the result sought by respondents has been rejected. *Mercantile National Bank* v. *Langdeau, supra; Fisher* v. *First National Bank of Omaha, supra; Sulil Realty Corp.* v. *Rye Motors, Inc., supra.*

IV

The action is a transitory action which can be brought against Chase only in New York

Respondents argue (Br. 17-20) that Chase can be sued in Florida because this is a local rather than transitory action. This argument rests on a misunderstanding of respondents' own claim against Chase as pleaded in the complaint and the "local action" exception set forth in *Casey* v. *Adams,* 102 U.S. 66 (1880).

In *Casey,* the national bank was a mortgagee of the property in dispute. The disputed property was located in a county other than where the bank was located, and the court in that county—which alone had jurisdiction to determine rights to the property—could adjudicate those rights only by exercising jurisdiction over the bank. If it could not do so, rights to the property would never be settled. Thus, this Court allowed the bank to be sued, as to its claim to the property, in the county where the property was located.

Here, unlike the bank in *Casey,* Chase is not the mortgagee of the property in dispute and makes no claim to any property; the mortgagee is the real estate investment trust for which Chase served as investment advisor. Hence, this action is not local in nature with regard to Chase, for determination of rights to the Florida *res* can be determined whether or not Chase is before the Florida court.

Respondents concede that they seek *in personam* relief against Chase, rather than relief *in rem.* They state (Br. 3) the bases of their action are breach of contract, fraud and usury—all manifestly transitory claims which can be readily asserted in New York. As such, Section 94 requires that these claims be brought against Chase in New York. *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra; Michigan National Bank* v. *Robertson, supra; Helco, Inc.* v. *First National City Bank, supra; Tanglewood Mall, Inc.* v. *Chase Manhattan Bank,* 371 F.Supp. 722 (W.D. Va. 1974), *aff'd,* 508 F.2d 838 (4th Cir. 1974), *cert. denied,* 421 U.S. 965 (1975).

Conclusion

The petition should be granted and the decision below reversed to preclude the Florida court's transgression of an important federal statute, the vitality of which has been recently reaffirmed by this Court in *Radzanower* v. *Touche, Ross & Co.*, ____ U.S. ____, 96 S.Ct. 1989, 48 L.Ed.2d 540 (June 7, 1976) and *National Bank of North America* v. *Associates of Obstetrics and Female Surgery, Inc., supra.*

Respectfully submitted,

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